

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of November 20, 1928, transmitting for my approval deed conveying parcel No. 136 of surplus Miami and Erie Canal lands, in the City of Cincinnati, Ohio, which it is proposed to convey to Albert Hafertepen.

I have carefully examined the form of such deed and am of the opinion that it is in all respects proper, in accordance with the provisions of Section 9 of Amended Senate Bill No. 123 of the 87th General Assembly (112 O. L. p. 212).

I am herewith returning the deed with my approval thereon and you are advised that the sale of these lands meets with my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2938.

APPROVAL, DEED TO MIAMI AND ERIE CANAL LANDS IN THE CITY
OF CINCINNATI—MAX J. GREENWALD.

COLUMBUS, OHIO, November 28, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of November 20th, transmitting for my approval deed to parcel No. 5 of surplus Miami and Erie Canal lands, in the city of Cincinnati, which it is proposed to convey to Max J. Greenwald.

I have carefully examined the form of such deed and am of the opinion that it is in all respects proper, in accordance with the provisions of Section 9 of Amended Senate Bill No. 123, of the 87th General Assembly (112 O. L. p. 212).

I am herewith returning the deed with my approval thereon and you are advised that the sale of these lands meets with my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2939.

BALLOTS—ELECTION—QUESTION OF ISSUANCE OF BONDS—DETER-
MINATION OF VOTER'S INTENTION IN MARKING.

SYLLABUS:

1. *The provisions of the statutes of Ohio requiring a cross-mark to be placed in the block on a ballot on the left of and directly opposite the name voted for or proposition submitted, are directory and not mandatory.*

2. *Under the law of Ohio, if it be possible to determine a voter's choice a ballot should not be rejected.*

3. *Where the question of the issuance of bonds is submitted to the electorate, a ballot containing the word "NO" written by the voter, either in the place provided for the cross-mark, or in the rectangular blank space in which appears the negative proposition "Against the Bond Issue," is of such character that it is impossible to ascertain the intention of the voter, and such ballot should be excluded from the count.*

4. *Where the question of the issuance of bonds is submitted to the electorate, a ballot containing the word "NO" opposite and following the proposition "For the Bond Issue," and within the rectangular space containing such proposition, the words "For the Bond Issue" being also obliterated by pencil marks, evinces an intention of the voter to vote against such bond issue, and the ballot should be so counted.*

5. *Where the question of the issuance of bonds is submitted to the electorate, and the word "No" is written within the rectangular space on the ballot containing the proposition "For the Bond Issue," and the word "Yes" is written within the rectangular space containing the words "Against the Bond Issue," the intention of the voter to vote against the bond issue is clearly evinced and the ballot should be so counted.*

6. *Where the question of the issuance of bonds is submitted to the electorate, and a cross-mark is made within the rectangular space on the ballot containing the proposition "Against the Bond Issue" and following such words, the intention of the voter to vote against the bond issue is clearly evinced and the ballot should be so counted.*

7. *Where the question of the issuance of bonds is submitted to the electorate, and a cross-mark is made within the rectangular space on the ballot containing the proposition "For the Bond Issue," and following such words, the intention of the voter to vote for the bond issue is clearly evinced and the ballot should be so counted.*

COLUMBUS, OHIO, November 30, 1928.

HON. SETH PAULIN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion, which reads, in part, as follows:

"At the last general election on November 6th, 1928, the proposition of issuing bonds of the Board of Education of Mentor Village School District in the sum of \$100,000.00 was submitted to the electors of said district and at the election 13 of the ballots were irregular in the following particulars, to-wit:

1. Two of the ballots were marked with the word 'no' with a black lead pencil in the blank space to the left of the words 'Against the bond issue.' For the purpose of identification, I have marked copy of these ballots Exhibit 'A.'

2. One of the ballots was marked with the word 'no' in the blank space with a lead pencil to the right of the words 'For the bond issue,' but the words 'For the bond issue' were obliterated by pencil marks. For the purpose of identification, I have marked this copy Exhibit 'B.'

3. One of the ballots was marked with the word 'no' in the blank space with a lead pencil to the right of the words 'For the bond issue.' The same ballot was marked with the word 'Yes' in the blank space to the right of the words 'against the bond issue.' Both markings were within the enclosed space on the ballot. For the purpose of identification, I have marked a copy of this ballot Exhibit 'C.'

4. Another one of the ballots was marked with the word 'no' with a lead pencil in the blank space to the right of the words 'Against the bond issue,' but within the enclosed space. For the purpose of identification I have marked a copy of this ballot Exhibit 'D.'

5. Three of the ballots were marked with an 'X' with black lead pencil to the right of the words 'Against the bond issue,' but within the enclosed space. For the purpose of identification, I have marked a copy of these ballots Exhibit 'E.'

6. Five of the ballots were marked with an 'X' with a black lead pencil to the right of the words 'For the bond issue.' For the purpose of identification I have marked a copy of these ballots Exhibit 'F.'

For your convenience I am herewith enclosing typewritten copies of the ballots with markings in approximately the same location as on the original ballots.

* * * ."

Accompanying your letter are typewritten copies of the ballots marked, as you say, in the same manner as the original ballots, and which are as follows :

"Exhibit 'A'—

BOND ISSUE AND TAX LEVY

Shall bonds be issued by the Board of Education of the Mentor Village School District, Lake County, Ohio, for the purpose of enlarging an existing fire-proof school house and purchasing furniture and furnishings for school houses for said district, in the sum of \$100,000.00 and a levy of taxes be made outside of the 15 mill limitation estimated by the County Auditor to average 2.18 mills for a maximum period of 15 years to pay the principal and interest of such bonds.

	FOR the Bond Issue
No	AGAINST the Bond Issue

Exhibit 'B'—

(Same heading as Exhibit 'A')

	FOR the Bond Issue	No
	AGAINST the Bond Issue	

Exhibit 'C'—

(Same Heading as Exhibit 'A')

	FOR the Bond Issue	No
	AGAINST the Bond Issue	Yes

Exhibit 'D'—

(Same Heading as Exhibit 'A')

	FOR the Bond Issue	
	AGAINST the Bond Issue	No

Exhibit 'E'—

(Same Heading as Exhibit 'A')

	FOR the Bond Issue	
	AGAINST the Bond Issue	X

Exhibit 'F'—

(Same Heading as Exhibit 'A')

	FOR the Bond Issue	X
	AGAINST the Bond Issue	

”

You request my opinion as to whether or not any of the ballots in this case should be counted, and if so, how many of them.

Section 5070, General Code, giving the rules to be observed in marking the ballot, among other things, provides:

“The elector shall observe the following rules in marking his ballot:

* * *

8. If a question is submitted, the elector shall make a cross mark in the blank space at the left of and before the answer which he desires to give.

9. No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.”

In *Richwood vs. Algoter*, 95 O. S. 268, the Supreme Court of Ohio held, as stated in the second paragraph of the syllabus, that:

“A ballot containing the word 'no' written by the voter in the blank space opposite the negative proposition submitted under the provisions of Section 6130, General Code, is of such character that it is impossible to ascertain the intention of the voter and should be excluded from the count.”

In that case "Exhibit '9' contained no cross-mark, but had the word 'No' written in the enclosed blank space immediately opposite and to the left of the negative proposition."

With reference to the ballot marked Exhibit "9," Judge Jones said as follows at page 271 of the opinion :

"Exhibit '9' was also properly excluded. The placing by the voter of the word 'No' in the blank space to the left of the negative proposition was a double negative, and it is not clear whether the voter intended to emphasize his dissent from the affirmative proposition submitted, or to emphasize his dissent from the negative proposition, to the left of which he had undertaken to write that word."

In laying down the principles to be applied in determining whether or not ballots improperly marked may be counted, at page 274 of the opinion it was said :

" * * * Suffice it to say that with a view to preserving the right of elective franchise to the citizen elector, in the absence of statutory provisions invalidating the ballot, *the courts of this country have generally adopted a rule of liberality for the purpose of ascertaining and safeguarding the intention of the voter in the exercise of his constitutional privilege, and the Ohio statute above quoted emphasizes that feature when it provides that no ballot shall be rejected for technicalities which do not make it impossible to determine the voter's choice.* If the courts of other states have held that certain requirements for marking ballots are mandatory, it is because the specific laws of such states relating thereto make ballots marked in non-compliance therewith invalid, or direct that they shall not be counted. And it is because of these distinctive features in the several jurisdictions that the courts generally have differed in their holdings as to whether the requirements are mandatory or directory.

The provisions of our law, requiring the cross-mark to be placed in the block directly opposite to the name voted for or proposition submitted, are directory. The Ohio law stipulates that no ballot shall be rejected if it is possible to determine the voter's choice, but the converse of the statement follows, that if it is possible to determine the voter's choice the ballot should not be rejected." (Italics the writer's.)

It was held in the case of *Thompson vs. Redington*, 92 O. S. 101, that :

"Writing the word 'yes' in the space to the left of the name of a candidate is technically wrong ; but the intention of the voter to vote for such candidate is clear ; and, under the ninth paragraph of this section, such ballot should not be rejected, since there is no technical error which makes it impossible to determine the voter's choice."

It was also held in the case of *Michel vs. Nailor*, 18 O. N. P. (N. S.) 500, 26 O. D. (N. P.) 473, which was affirmed without opinion by the Court of Appeals March 14, 1916, that :

"Although this section provides for making a cross-mark at the left of the name of each candidate for whom the voter desires to vote, a ballot will be counted for candidate if the cross-mark appears to the right of his name but within the rectangular space containing his name, and if there is nothing on the ticket to show the intention of the voter to vote for the rival candidate."

In the case of *Bambach vs. Markley*, 9 O. C. C. (N. S.) 560, the question was whether certain ballots informally marked should be counted for the contestant, Bambach, and it was decided in the affirmative. Bambach was a candidate for common pleas judge and his name was the only one on a certain non-partisan ticket. The court held that:

"If a voter makes a mark above or below or on the side, or at the top of the column, occupied by the name of the non-partisan candidate, his intention to vote for such candidate is clearly indicated and the ballot should be counted."

This case was affirmed by the Supreme Court in 76 O. S. 636, without report. At page 567 of the opinion in the Circuit Court, the following language appears:

"It is a rule of construction laid down by all text-writers upon the subject of counting votes that the primary step is to determine if possible the intention of the voter, and where that can be done no vote should be thrown out. * * * The courts, therefore, have construed all those Australian ballot laws in a liberal manner. * * * In obedience to this rule of construction, if from an inspection, and from the evidence it is possible to determine the intention of the voter, you must do so."

In the opinion of *Michel vs. Nailor*, supra, at page 504, it was said:

"This, however, is not intended to encourage laxity in the marking of ballots by those who understand how, but seeks to give effect to what is manifestly intended by one who does not understand how. Voters are generally honest and do the best they can in marking a ballot. A liberal interpretation of the law is not intended to foster fraud, or negative the secrecy of the ballot."

And it was further said on the same page that:

"The ballot, Exhibit 4, has a cross-mark after the name of the contestee Nailor, but within the rectangular space where his name is printed. There are no marks on the other ticket. The placing of the cross-mark after his name does not appear to have been done for any ulterior or improper purpose, but seems to be the act of an honest voter who did not understand just how to mark his ballot right. I think his intention is plain and that his choice for mayor was the contestee Nailor, and this vote must be counted for him."

In the case of *Board of Elections of Montgomery County, et al. vs. Henry*, 25 Ohio App. 278, the fifth and sixth branches of the headnotes are as follows:

5. "Section 5070, paragraph 9, General Code, providing for liberal interpretation of ballot law in favor of voter, is mandatory.

6. Under Section 5070, paragraphs 6 and 9, General Code, where some of voters wrote H's name in pencil for election as member of central committee of Republican party, but failed to add cross-mark, such ballots held properly counted for H; failure of voter to add cross mark being technical error."

The concluding paragraph of the opinion in this case reads as follows :

"In deciding this question, we have no hesitancy in declaring that the voter, by writing the name of the candidate in the appropriate space on the ballot, clearly indicates his intention to vote for the person whose name he has written, and that the failure of the voter to add the cross mark is a technical error. We therefore hold that it was the duty of the board of elections to canvass and count said disputed ballots for Henry, and to issue a certificate accordingly."

The Supreme Court of Ohio refused a motion to certify the record in the above mentioned case.

Coming now to the several exhibits submitted with your communication and applying the principles annunciated in the opinions of the court above cited, it is clear that, in view of the holding of the Supreme Court in the case of *Richwood vs. Al-gower*, supra, and for the reasons given by Judge Jones in the opinion in that case, ballots "A" and "D" should not be counted. In each of these instances there is a double negative, and it cannot be told "whether the voter intended to emphasize his dissent from the affirmative proposition submitted, or to emphasize his dissent from the negative proposition."

Exhibits "B" and "C" present more difficulty, but I am inclined to the opinion that the intention of the voter can be gathered in each of these instances.

In the case of Exhibit "B," in answer to the phrase "For the Bond Issue," and within the rectangular square containing such phrase, a voter has written the negative "No;" and for the apparent purpose of further emphasizing his stand against the bond issue, the words "For the Bond Issue" were obliterated by pencil marks. No marks whatever appear in the square containing the words "Against the Bond Issue." It would seem that the intention of the voter was to indicate his opposition to the bond issue in question, and, this being the voter's intention, it is my opinion that the ballot should be counted as a vote against said bond issue.

In Exhibit "C" the intention of the voter is more clearly indicated. On this ballot, in answer to the words "For the Bond Issue," the voter wrote the word "No," while in answer to the question "Against the Bond Issue," he wrote the affirmative "Yes." This ballot would seem to me clearly to indicate an intention to vote against the bond issue submitted.

With reference to Exhibits "E" and "F," I have little difficulty in determining how these ballots should be counted. The only error in marking each of these ballots consisted in placing the "X" on the right of the ballot, although within the rectangular spaces provided for the issue submitted and after the words "Against the Bond Issue" on Exhibit "E" and the words "For the Bond Issue" on Exhibit "F." These ballots, should, of course, have been marked in the space provided therefor on the left of the ticket and before the words contained thereon. However, the intention of the voter seems plain and the rule applied by the Court of Appeals in the case of *Michel vs. Nailor*, supra, is clearly applicable. Exhibit "E," therefore, should be counted as a vote against this issue, while Exhibit "F" is plainly a vote for the issue.

Summarizing my conclusions, it is my opinion that :

1. The provisions of the statutes of Ohio requiring a cross-mark to be placed in the block on a ballot on the left of and directly opposite the name voted for or proposition submitted, are directory and not mandatory.
2. Under the law of Ohio, if it be possible to determine a voter's choice, a ballot should not be rejected.

3. Where the question of the issuance of bonds is submitted to the electorate, a ballot containing the word "No" written by the voter, either in the place provided for the cross-mark, or in the rectangular blank space in which appears the negative proposition "Against the Bond Issue," is of such character that it is impossible to ascertain the intention of the voter, and such ballot should be excluded from the count.

4. Where the question of the issuance of bonds is submitted to the electorate, a ballot containing the word "No" opposite and following the proposition "For the Bond Issue," and within the rectangular space containing such proposition, the words "For the Bond Issue" being also obliterated by pencil marks, evinces an intention of the voter to vote against such bond issue, and the ballot should be so counted.

5. Where the question of the issuance of bonds is submitted to the electorate, and the word "No" is written within the rectangular space on the ballot containing the proposition "For the Bond Issue," and the word "Yes" is written within the rectangular space containing the words "Against the Bond Issue," the intention of the voter to vote against the bond issue is clearly evinced and the ballot should be so counted.

6. Where the question of the issuance of bonds is submitted to the electorate, and a cross-mark is made within the rectangular space on the ballot containing the proposition "Against the Bond Issue" and following such words, the intention of the voter to vote against the bond issue is clearly evinced and the ballot should be so counted.

7. Where the question of the issuance of bonds is submitted to the electorate, and a cross-mark is made within the rectangular space on the ballot containing the proposition "For the Bond Issue" and following such words, the intention of the voter to vote for the bond issue is clearly evinced and the ballot should be so counted.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2940.

GUARD RAILS—DUTY OF COUNTY COMMISSIONERS TO MAINTAIN
SAME—NOT RELIEVED BY NORTON-EDWARDS ACT.

SYLLABUS:

Counties of Ohio are not relieved from the requirements imposed by Section 7563, General Code, by the provisions of the Norton-Edwards Act (H. B. No. 67, 112 v. 430), or other sections of the General Code, establishing and providing for the construction and maintenance of a state highway system. Opinions Nos. 461 and 2155 followed and approved.

COLUMBUS, OHIO, November 30, 1928.

HON. G. C. SHEFFLER, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—I am in receipt of your letter which reads as follows:

"The County Commissioners of our county desire me to write you concerning guard rails for county bridges, viaduct or culvert, if the approach is more than six feet high on either side of said bridge, etc.